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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

MAY 10 1993

FEDERAL COMMUNICATIONS COMMISSION
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OFFICE OF THE SECRETARY

In re Applications of)

MM Docket No. 93-88)

EZ COMMUNICATIONS, INC.)

File No. BRH-910401C2)

For Renewal of License of FM Radio)
Station WBZZ(FM) on Channel 229B)
at Pittsburgh, Pennsylvania)

ALLEGHENY COMMUNICATIONS GROUP,)
INC.)

File No. BPH-910628MC)

For Construction Permit for)
a New FM Broadcast Station on)
Channel 229B at Pittsburgh,)
Pennsylvania)

To: The Commission

MOTION FOR LEAVE TO FILE
APPLICATION FOR REVIEW

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Date: May 10, 1993

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SUMMARY

It is necessary and appropriate for the Commission to immediately review the Hearing Designation Order in this proceeding. This case presents fundamental questions about the Commission's policies on indecency, general harassment and abuse of process. Immediate review of the order would serve the public interest by avoiding a probable remand, which would be far more disruptive than current consideration of Allegheny's application for review. Immediate consideration of the application for review would also provide needed clarification of Commission policy and guidance to the staff on issues of fundamental importance to the Commission. Accordingly, Allegheny requests that the Commission accept and consider the application for review being filed simultaneously with this motion.

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To: The Commission

MOTION FOR LEAVE TO FILE
APPLICATION FOR REVIEW

Allegheny Communications Group, Inc. (Allegheny), by its attorneys, now requests that the Commission accept and consider the application for review being filed simultaneously with this motion.

I. INTRODUCTION

The application for review seeks Commission review of the Hearing Designation Order, DA 93-361 (released April 5, 1993) (HDO) to the extent that the HDO denied Allegheny's petition to deny the mutually exclusive renewal application of EZ Communications, Inc. (EZ). Allegheny's petition raised important questions about EZ's qualifications to remain the licensee of WBZZ(FM). The petition also raised important

legal questions about the Commission's policies on indecent programming, sexual harassment, abuse of the Commission's processes, defamation, and news distortion. These areas are all of fundamental importance to the Commission, and as Allegheny will show in greater detail below, the Commission's resources would best be served by immediate consideration of Allegheny's application for review.

Allegheny exhausted its administrative remedies by filing a timely motion with the Presiding Judge in the proceeding asking him to certify the HDO to the Commission. The Presiding Judge denied the motion by Memorandum Opinion and Order, FCC 93M-218 (released May 3, 1993) (Attachment 1 to this motion). The Presiding Judge did not reach the merits of Allegheny's arguments. Instead, his sole basis for denying the motion was that Allegheny raised questions of fact instead of questions of law. The Presiding Judge's premise was incorrect: Allegheny is making a series of legal arguments about the legal standards to be used in evaluating its petition to deny and in determining whether facts support the specification of basic qualifications issues. Those questions are important legal questions that require immediate Commission review.

II. BACKGROUND

Before demonstrating why immediate consideration of its application for review is necessary, Allegheny will provide the Commission with the factual background necessary to

understand this case. There have been two adjudications of misconduct by EZ in connection with certain statements made over the air concerning WBZZ news director Liz Randolph. The first adjudication was a November 16, 1988 opinion of an arbitrator sustaining a grievance brought on Ms. Randolph's behalf for severance pay. A copy of the arbitrator's award and opinion is submitted as Attachment 2 to this motion. Attachment 3 to this motion is an October 16, 1989 Opinion and Order of United States District Judge Donald E. Ziegler sustaining the award.

The arbitrator's opinion details a continuing series of "jokes and suggestive remarks that were directed to [Ms. Randolph that] were lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should have been subjected to..." Attachment 2, P. 12. The arbitrator's findings set forth in detail his findings of a continuing series of lewd and offensive comments made over the air by EZ's disc jockeys, Jim Quinn and Don "Banana" Jefferson, about Ms. Randolph's sexual behavior. The opinion states as follows:

The grievant's un rebutted testimony was that these comments first began in February, 1986 while she was on vacation on a Caribbean Cruise. Quinn and Banana stated during their program that she was on the "Love Bloat" [sic] and that she was having promiscuous sex with various people on the cruise ship. Apparently these and similar comments were made the entire time she was on vacation as an on-going topic for their brand of 'humor'... (Arbitrator's Opinion, P. 3).

The next on-the-air comments occurred in July, 1986 while the grievant was vacationing in Cape Cod, Massachusetts. The grievant testified that upon her return, she heard from various friends who had listened to 'The Quinn and Banana Show' that they indicated she was having sex with various people in Cape Cod. (Id.)

On-the-air comments, such as the following, apparently continued on a steady basis from July of 1986 to January of 1988, 'suggesting' that she was a promiscuous person, that she had oral sex and intercourse with large numbers of people, that she was mentally unstable and had sexually transmitted diseases, that she was having sex with a number of the Pittsburgh Penguins as well as members of the U.S. Marine Corps, and the fact that she knows the hotline numbers of the Center for Disease Control by heart. Id. at P. 4.

This ongoing harassment reached a climax on January 22, 1988, when a disc jockey from another EZ station called in with a joke which was recorded and then later broadcast. The joke went as follows:

"My wife goes to the same hairdresser that Liz Randolph goes to."

"Oh, she does?"

"Yeah, she does."

"Did you know that Liz Randolph has a tattoo on her forehead?"

"Oh yeah, what does it say?"

"It says, 'Let go of my ears, I'm doing the best I can.'"

The arbitrator found there was no doubt that the "joke" referred to oral sex. Arbitrator's Opinion, Pp. 4-5. When

Ms. Randolph and to contest her right to severance pay on the grounds that she engaged in "a flagrant neglect of her duties..." In holding that EZ acted improperly in denying severance pay, the arbitrator concluded (Attachment 2, P. 13):

There is no question, under these circumstances, that the grievant's action of walking off the job was not only understandable, but more importantly, was justifiable. The conduct on the part of the disc jockeys was degrading, humiliating and a serious invasion of her personal rights and dignity. I would find it unreasonable to require the grievant to have remained on the job after being subjected to such vile and lewd insults and be expected merely to file a grievance. These circumstances are a narrow exception to the self-help rule and justify the grievant's actions.

Meanwhile, Ms. Randolph sued EZ, Jefferson and Quinn in the Court of Common Pleas, County of Allegheny, Pennsylvania for defamation, intentional infliction of emotional distress, and invasion of privacy (Case No. GD88-02730). On February 14, 1990, the jury hearing the case entered a verdict in favor of Ms. Randolph and against EZ on the defamation and invasion of privacy counts and against Jefferson and Quinn on all three counts.¹ The jury awarded damages of \$694,204, which was slightly reduced by the Judge. A copy of the jury's verdict is submitted as Attachment 4 to this petition.

Ms. Randolph also filed a complaint with the Pennsylvania Human Relations Commission alleging violations of Pennsylvania law prohibiting sex discrimination. After receiving a right

¹ The Court entered a compulsory nonsuit on the intentional

to sue letter from that agency, she commenced a second action in Pennsylvania state court (Case No. GD89-22010).

On May 24, 1991, EZ and Ms. Randolph entered into a settlement with respect to the state court actions - the first action, which was on appeal, and the sex discrimination case, which was still pending before the trial court. Attachment 5 to this petition is a declaration from Lewis I. Cohen explaining his attempts to obtain information about the settlement with excerpts from the transcript of a hearing concerning the settlement.

At the hearing, the Judge noted:

"that this settlement encompasses the plaintiff withdrawing their letter of inquiry with the FCC.

"Further, the plaintiff agrees that she will not file a complaint with the FCC. She will not assist anybody in filing a complaint with the FCC. She will in no way directly or indirectly assist anybody in filing a complaint.

"Further, should she be subpoenaed, in the unlikely event some party that we don't know about files a complaint, she will refuse to testify on the grounds that the Court Order in this present case prohibits her; and, it is understood that if that Order doesn't prevent her, that that will not be a violation of this agreement.

"In other words, she will go as far as refusing to testify and saying that you'll have to get approval from Judge Musmanno who will not give approval. If somehow I'm overruled by some higher court, then understand that that's not a breach of the agreement. She has given her assurance that she will not do anything voluntarily in any way to cause you a problem with the FCC. I mean I don't know how much broader I can make it other than that."

The settlement agreement was never submitted to the Commission for approval pursuant to Section 73.3589 of the Commission's rules.

III. THE STANDARD FOR REVIEW

A party seeking review of an interlocutory action must show "that the resulting disruption of the proceeding is outweighed by compelling and urgent circumstances which could not be considered by the presentation of arguments in accordance with that Rule" (i.e., deferred consideration of the application for review). Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 69 RR 2d 946, 946-947 (1991). In this case, several circumstances compellingly support immediate consideration of the application for review. First, immediate consideration of the pleading will avoid the substantial probability that this case would have to be remanded after the Review Board issues a decision in this case. Any disruption that would result from consideration of Allegheny's application for review would be far outweighed by the disruption that would result if this proceeding had to be remanded after a comparative hearing, initial decision, and Review Board decision. Second, Allegheny's petition raised fundamental issues about matters such as indecent programming and sexual harassment which the Commission has made matters of special importance. Third, the HDO has raised important uncertainties about the Commission's policies in these areas of special importance, and immediate consideration of

Allegheny's application for review would provide needed guidance to the staff as well as to Commission licensees.

A. Necessity for Remand

If the Commission defers consideration of Allegheny's application for review there is a substantial possibility that either the Commission or the Court of Appeals would hold that a hearing was required to be held on one or more of the issues requested by Allegheny. A brand new hearing would then have to be held, which would cause major delays in the resolution of this proceeding.

The Court of Appeals has not hesitated to require the Commission to hold further hearings when the Commission has erroneously refused to specify hearing issues. Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 71 RR 2d 1386 (D.C. Cir. 1993), David Ortiz Radio Co. v. FCC, 941 F.2d 1253, 69 RR 2d 1011 (D.C. Cir. 1991). It would not be in the interest of EZ, Allegheny, the Commission, or the public to go through the entire hearing process twice because issues were not added early in the process that should have been added.

In determining the possibility of a remand, it is important to keep in mind the standards that should have been used in evaluating Allegheny's petition to deny. In evaluating a petition to deny, the Commission must perform a two step analysis. First, the Commission must determine whether the petition has raised a prima facie case that a

grant of the application would be inconsistent with the public interest, convenience and necessity. Section 309(d)(1) of the Communications Act, 47 U.S.C. §309(d)(1). If the facts can possibly be read to support the petitioner's ultimate inference, the prima facie showing has been made. Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561, 65 RR 2d 538, 541 (D.C. Cir. 1988), citing Gencom, Inc. v. FCC, 832 F.2d 171, 181 (D.C. Cir. 1987).² Then, if any substantial and material question of fact exists, a hearing must be held. Section 309(d)(2) of the Communications Act, 47 U.S.C. §309(d)(2).

The HDO does not reflect any awareness of the standards to be used in evaluating petitions to deny, and it improperly holds Allegheny to a higher standard than the standard established by the Communications Act. Allegheny's petition was not evaluated to see if the facts could possibly be read to support Allegheny's allegations. Instead, the HDO appears to require Allegheny to show by a preponderance of the evidence or some higher standard that an issue was required. Moreover, as Allegheny demonstrates in its application for review, the HDO makes several critical factual errors. There is clearly a substantial possibility of a remand in this case if the HDO is not reviewed at this time. Under those

² In opposing Allegheny's motion to certify, the Mass Media Bureau took issue with this assertion. Mass Media Bureau Opposition, P. 2. The cases cited, which are binding upon the Commission, clearly show that the Mass Media Bureau is wrong.

circumstances, the litigation would be materially expedited by reviewing the HDO now.

B. Importance of Issues to the Commission

Allegheny's application for review is not limited to routine matters that are raised everyday in comparative proceedings. In Great Lakes Broadcasting, Inc., supra, the

The importance of eradicating sexual harassment in the workplace is beyond doubt. Section 73.2080(b)(4) of the Commission's rules requires all broadcast licensees to:

[c]onduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon...sex from its personnel policies and practices and working conditions... (Emphasis added).

The HDO, however, at ¶11, held that sexual discrimination that

Commission agrees with Allegheny that the HDO contains legal errors, immediate consideration of the application for review would prevent other portions of the Commission from relying upon the HDO's erroneous analysis. If the Commission agrees with the HDO, however, immediate consideration of the application would still be beneficial by providing a definitive Commission interpretation on the legal principles in question.

With respect to each of the issues requested by Allegheny, the HDO raises important legal questions. Concerning indecency, the HDO denied Allegheny's requested issue primarily on the procedural ground that Allegheny did not provide a tape or transcript of the programs at issue. The HDO failed to note that Allegheny had provided a detailed arbitrator's opinion which quoted one of the key broadcasts and made detailed findings on the broadcast at issue. The HDO used a technical, procedural ruling to foreclose substantive consideration of WBZZ's programming, although the arbitrator's opinion provided a more than adequate basis for considering whether a hearing issue was necessary. The HDO establishes an unnecessary procedural requirement that, in this case, would prevent substantive consideration of an indecency complaint for no legitimate reason. The HDO thus calls into question the Commission's ability to enforce the statutory limitations on indecent programming.

The HDO's refusal to specify an EEO issue also raises important legal questions. First, under the HDO's ruling, sexual harassment that does not relate to the recruiting, hiring or promoting of employees is not prohibited. That holding is in plain conflict with the letter and spirit of the EEO rule. Moreover, the HDO holds that the Commission will not consider an adverse jury verdict if the proceeding settles on appeal. That holding is in conflict with the Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1205, 59 RR 2d 801, 819-820 (1986), which holds that an adjudication by a trier of fact will be considered, even "during the pending of an appeal." That issue is also raised in connection with Allegheny's request for a defamation issue. In light of the HDO, clarification of Commission policy is necessary.

With respect to Allegheny's request for an abuse of process issue, the HDO raises important issues about the integrity of the Commission's processes. Allegheny demonstrated in its petition to deny that Allegheny had paid Elizabeth Randolph to (1) withdraw her pending complaint with the Commission, (2) refrain from filing further pleadings challenging EZ's qualifications, and (3) get her to refuse to testify before the Commission, even in the face of a valid subpoena issued by the Commission. No Commission approval was ever obtained for these payments. The HDO raises serious doubts about the Commission's willingness to protect the

integrity of its processes and its ability to obtain evidence as to whether broadcasters operate in the public interest. Immediate Commission review will clarify the Commission's intentions and provide guidance as to the scope and operation of the Commission's new rules.

Finally, with respect to all-channel broadcast coverage

which would normally limit the application for review to five pages. The application for review, by necessity, contains many arguments on issues of substantial public interest importance. A minimal extension of the page limitation would serve the public interest by allowing Allegheny to present its arguments in a presentable fashion. The Commission has waived this particular page limitation in other cases. See, e.g. Edwin A. Bernstein, FCC 90I-05 (released January 16, 1990) (Attachment 7 to this motion). Accordingly, Allegheny requests that the seven page application for review be accepted.

Accordingly, Allegheny asks the Commission to accept and to consider the application for review being filed simultaneously with this motion.

Respectfully submitted,

ALLEGHENY COMMUNICATIONS GROUP,
INC.

By Morton L. Berfield
Morton L. Berfield

By John J. Schauble
John J. Schauble

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Washington, DC 20036
(202) 466-8565

Its Attorneys

Date: May 10, 1993

**Before the
Federal Communications Commission
Washington, D.C. 20554**

FCC 93M-218
31421

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For a Construction Permit for a New)	
FM Broadcast Station on Channel 229B)	
at Pittsburgh, Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Issued: April 29, 1993; Released: May 3, 1993

1. Under consideration are 1) Motion to Certify Hearing Designation Order to the Commission, filed April 12, 1993 by Allegheny Communications Group, Inc.; 2) Opposition to Motion to Certify, filed April 14, 1993; and 3) Mass Media Bureau's Opposition to Motion to Certify Hearing Designation Order to the Commission, filed April 21, 1993.

2. Allegheny requests that the Presiding Judge certify to the Commission the Hearing Designation Order (HDO) "to the extent that the HDO denied Allegheny's June 28, 1991 'Petition to Deny' directed against the renewal application of EZ Communications, Inc. (EZ)." Section 1.115(e)(3) of the Commission's Rules provides:

"Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation."

3. Allegheny sought the specification of five issues relating to EZ's qualifications to be a Commission licensee. Allegheny argues that since the issues all "relate to" EZ's basic qualifications, they constitute "controlling questions of law" within the meaning of Section 1.115(e)(3). That superficially seductive argument notwithstanding, however, Allegheny has structured its motion in a way which makes it quite clear that its complaint is really with the views taken in the HDO of the factual allegations made by

Allegheny. Section 1.115(e)(3) requires that the "controlling question of law" be one about which there exists a "substantial ground for difference of opinion." Allegheny seeks to meet this requirement by purporting to "explain why a substantial ground for difference of opinion exists" with regard to each of the factual issues which it sought against EZ. That effort, however, cannot transform those factual issues into "controlling questions of law." What is involved here are merely differences of opinion about facts. Thus:

a. it was determined in the HDO that any allegedly indecent segments in EZ programming amounted to no more than isolated instances. Allegheny argues that the facts can be read to support the conclusion that EZ repeatedly broadcast indecent programming.

b. it was determined in the HDO that no discrimination in recruiting, hiring or promoting of employees had been demonstrated. Allegheny argues that "the HDO is just wrong on this point."


c. it was determined in the HDO that Ms. Randolph did not threaten to file a petition to deny or informal objection and that EZ made no payment to induce her not to do those things. Allegheny argues that the HDO "is just plain wrong."

d. it was determined in the HDO that "there is no evidence that the allegedly offensive remarks" about Ms. Randolph were "made in the context of a news broadcast or were intended to constitute news" and that "given the entertainment context of the statements, we do not believe that the listening public would construe the statement as news." Allegheny appears to claim that the broadcast matter in question was, in fact news.

Alleged factual errors in a hearing designation order do not constitute a valid basis for certification pursuant to Section 1.115(e)(3). The motion will be denied.

IT IS ORDERED THAT the Motion to Certify Hearing Designation Order to the Commission IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


Edward Luton
Administrative Law Judge

American Arbitration Association

1993-1994 YEARBOOK NO. 2

OPINION AND AWARD

RONALD F. TALARICO
ARBITRATOR

AMERICAN ARBITRATION ASSOC.
CASE NUMBER: 55-300-0064-88

AMERICAN ARBITRATION ASSOC.
CASE NUMBER: 55-300-0064-88

AMERICAN ARBITRATION ASSOC.
CASE NUMBER: 55-300-0064-88

ELIZABETH RANDOLPH

PAYMENT OF SEVERANCE BENEFITS

August 19, 1988
Pittsburgh, Pennsylvania

November 2, 1988

For the Union

Samuel P. Kamin, Esquire
Terry L. Jordan, Esquire

For the Employer

Stephen H. Jordan, Esquire

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esquire, was mutually selected by the parties from a list supplied by the American Arbitration Association to hear and determine the issues herein. A hearing was held in Pittsburgh, Pennsylvania, on August 19, 1988, at which time the parties were given an opportunity to introduce documentary evidence and to examine and cross examine witnesses. Post-Hearing Briefs were submitted by both parties on November 2, 1988, at which time the record was closed. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

SCHEDULE 1 - ANNOUNCERS

* * *

B. Staff Working Conditions

* * *

7. The following provisions shall govern severance: each announcer shall receive a minimum of four weeks notice of termination of employment or four weeks salary in lieu of such notice. In addition, the following severance schedule shall apply:

3 - 6 months	2 weeks
6 - 12 months	4 weeks
1 - 2 years	6 weeks
2 - 3 years	8 weeks

Then one additional week's severance for each year of service. All payments in lieu of notice, severance pay, accumulated holiday or vacation pay shall be paid at the staff

announcer' s personal agreement rate is such announcer has a

It has become common practice in today's radio industry for the newsperson, weather reporter, and even traffic reporter to engage in "banter" with the disc jockeys rather than just giving their various reports. The grievant alleges that, on a number of occasions, Quinn and Banana made lewd and derogatory comments about her during their radio program to the effect that she was sexually promiscuous, thereby causing her reputation to suffer in the Communications Industry and causing her emotional and physical pain and suffering.

The grievant's unrebutted testimony was that these comments first began in February, 1986 while she was on vacation on a Caribbean Cruise. Quinn and Banana stated during their program that she was on the "Love Bloat" and that she was having promiscuous sex with various people on the cruise ship. Apparently these and similar comments were made the entire time she was on vacation as an on-going topic for their brand of